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Bipartite Voluntary Peer Review of Competition Law and Policy:

Fiji and Papua New Guinea

Overview of Comparative Report*

* This document is an overview of the full comparative report on the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea (UNCTAD/DITC/CLP/2015/2).

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Note

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Acknowledgements

Voluntary peer reviews of competition law and policy are conducted at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy or the five-yearly United Nations Conference to Review the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.

This overview was prepared for UNCTAD by Deborah Healey, Associate Professor, University of New South Wales, Australia. It is based on the national self-assessment reports prepared for the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea. The substantive backstopping and review of the bipartite voluntary peer review was the responsibility of Graham Mott, Competition and Consumer Policies Branch, UNCTAD.

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Preface

1. This document provides an overview of the comparative report on the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea. The purpose of the peer review was to assess the legal framework and enforcement experiences in each jurisdiction, draw lessons and best practices from each jurisdiction and examine the potential for cooperation between the two jurisdictions.

2. The comparative report assesses current progress in the two jurisdictions and proposed legislative and policy amendments. The report makes various recommendations with regard to the proposals and additional issues, including future policy. While it has been termed a bipartite review and the approaches of both jurisdictions to their competition laws have some similarities, there are significant differences in location, policy and approach, which make a combined approach to analysis challenging and lacking utility in some respects. The suggestions of the individual jurisdictions are therefore considered separately and in detail in the comparative report, though the report also notes areas where lessons may be learned by one jurisdiction from the experience or approach of the other jurisdiction. The comparative report is divided into three parts, as follows: part I introduces the two jurisdictions; part II makes general recommendations for Governments and individual regulators, based on an overall assessment of the individual self-assessment reports; and part III provides commentary and analysis on the individual self-assessment reports.

3. This overview amalgamates part II and part III of the comparative report.

I. Introduction

4. The comparative report on the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea is based on the national self-assessment reports of the individual jurisdictions, referred to as the Fiji report and the Papua New Guinea report. The comparative report assesses these reports and makes comments and recommendations as appropriate.

5. It is now well accepted that "the size of a market necessarily affects the competition policy it should adopt".[1] A small market economy is one "which can support only a small number of competitors in most of its industries".[2] Both of the subject jurisdictions fall under this and other definitions of a small market economy. Both are also developing countries with the associated competition law issues.[3] This means that the traditional competition law and policy frameworks of larger developed market economies are unlikely to be entirely appropriate for either Fiji or Papua New Guinea. The political economies of the two jurisdictions are important to the content and operation of their competition laws. They share some similarities, but there are also important distinctions.

6. The Independent Consumer and Competition Commission (ICCC) Act of Papua New Guinea was enacted in 2002. The Papua New Guinea report describes its approach to

[1] MS Gal, 2003, *Competition Policy for Small Market Economies*, Harvard University Press, Cambridge, Massachusetts.

[2] Ibid.

[3] See EM Fox, 2012, Competition, development and regional integration: In search of a competition law fit for developing countries, in J Drexl, M Bakhoum, EM Fox, MS Gal and DJ Gerber, eds., *Competition Policy and Regional Integration in Developing Countries*, Edward Elgar publishing, Cheltenham, United Kingdom of Great Britain and Northern Ireland.

the peer review and the possible amendment of the ICCC Act in a practical way, outlining the need not to over-emphasize comments concerning the simplicity of the laws of other jurisdictions. Papua New Guinea needs to assess its own requirements.

7. The Commerce Commission Decree of 2010 of Fiji is a more recent law. The Commerce Commission itself, however, was established under the Commerce Act of 1998, and re-established in 2000. The Commerce Act was enacted to "promote effective competition and informed markets, encourage fair trading, protect consumers and businesses from restrictive practices and control prices of regulated industries and other markets where competition is lessened or limited". Various entities and laws were merged, and the Act was amended in 2010, when the Commerce Commission Decree was enacted.

8. Papua New Guinea has been an independent country for 39 years, and the Papua New Guinea report states that the country "is still involved in nation building and development" and that it seeks a "better distribution of economic benefits", as well as economic development. The unusual nature of the country's economy is well described in the Papua New Guinea report. The diversity of economic conditions includes highly concentrated industries in which well-resourced operators engage in conduct that disadvantages competitors, small business, farmers and the community. The Papua New Guinea report also notes the "mammoth task" of economic management in a country with seven million people and more than 800 languages, 75 per cent of whom live in rural settings in rugged terrain. The small size, isolation and fragmentation of the country mean that it is unlikely to be a market that will attract large numbers of competitors, or even multiple competitors, in many of its industries.

9. Fiji is a sovereign democratic State that describes itself as a middle-income country and one of the more developed of the Pacific island economies. The four largest islands are surrounded by coral reefs and have centrally located mountains that cover a large proportion of the land mass. There are a total of 330 islands, of which approximately 100 are inhabited; 83 per cent of the land is owned communally by indigenous Fijians and 9 per cent by the State, while 8 per cent is freehold land. Fiji is a developing country with a large subsistence agriculture sector. However, only 16 per cent of the land is suitable for intensive agriculture. The country's economy is mainly based on agriculture and tourism, with tourism and sugar providing over 50 per cent of employment. Poverty is a key Government challenge. [4] Issues of size, relative isolation from other markets and fragmentation raise similar concerns to those in Papua New Guinea about the nature of its markets.

10. Despite their enactment as economic statutes to engender competitive conduct in markets, the objects, forms, contents and interpretations of different competition laws vary greatly. The objects of laws set out their underlying purposes and assist regulators and courts to resolve uncertainty and ambiguity in meaning.

11. In this regard, the ICCC Act has three primary objectives and seven facilitating objectives set out in section 5 (1) and section 5 (2). The primary objectives are to enhance the welfare of the people of Papua New Guinea through the promotion of competition, fair trading and protection of consumer interests, to promote economic efficiency and efficiency in industry structure, investment and conduct and to protect the long-term interests of the people of Papua New Guinea with regard to the price, quality and reliability of significant goods and services. The facilitating objectives set out in section 5 (2) overlap some of the primary objectives as well as the content of the ICCC Act. It may be that the facilitating objects could be simplified.

[4] Fiji, Ministry of Finance, 2014, *Economic and Fiscal Update: Supplement to the 2015 Budget Address*, available at http://fijitradela.com/pdf/2015budgetsupplement.pdf.

12. The Fiji Ordinance has relatively common objectives in terms of competition law (promoting the interests of consumers, the effective and efficient development of industry, trade or commerce and effective competition in industry, trade or commerce) except for the objective in section 2 (1) of the Commerce Commission Decree of ensuring "equitable returns for businesses with fair and reasonable prices charged to consumers". This may be linked to its price regulation function, although the Ordinance has separate objectives in relation to regulated industries and access regimes, as follows: promote effective competition in the interests of consumers; facilitate an approximate balance between efficiency and environmental and social considerations; and ensure non-discriminatory access to monopoly and near-monopoly infrastructure or services.

13. Regulators have the key role in enforcing competition laws. In Papua New Guinea, the regulator is the Independent Consumer and Competition Commission, an independent statutory authority established under the ICCC Act. Its main functions relate to competition, consumer protection and economic regulation, and it administers the ICCC Act and other laws such as the Prices Regulation Act, Commercial Advertisement (Protection of the Public) Act and Trade Measurements Act. The Fiji Commerce Commission is an independent statutory body established under the Commerce Commission Decree. It has roles related to competition, consumer protection, price regulation and monitoring. Each regulator is thus responsible for competition, consumer protection and price regulation, as well as some other matters.

14. Aspects of the laws of the two jurisdictions are modelled to a significant extent on the competition and consumer laws of Australia and New Zealand. Both of these laws are established and regarded as effective. The close links in geography and politics between the four jurisdictions makes this unsurprising. However, the Australian law in particular is a complex piece of legislation, which may create interpretational difficulties for a newer jurisdiction. Neither the Australian law nor the law in New Zealand is simple for business or consumers to understand, in a number of respects. In addition, competition law is an economic statute, which adds to its complexity. However, both Fiji and Papua New Guinea are common law jurisdictions and may be guided by established interpretations in Australia and New Zealand. Comparisons are made throughout the detailed analysis to these laws and their application as relevant, on the assumption that the experience of the initiating jurisdictions, including reviews conducted there, might inform further consideration of the laws of Fiji and Papua New Guinea. However, no assumption is made that the laws of Fiji and Papua New Guinea should continue to reflect the laws in Australia and New Zealand. There is also no assumption made that the laws of Fiji and Papua New Guinea should or will be interpreted as the laws of Australia and New Zealand have been interpreted by their regulators or their courts.

II. Findings and recommendations

15. Various suggestions and recommendations for the amendment and improvement of the laws of Fiji and Papua New Guinea are made in part III of the comparative report. This part of the overview draws together the most important issues arising from the peer review and makes various recommendations, which are more fully discussed in the comparative report.

A. General recommendations

1. Substantive provisions: Recommendations

16. The objects of the laws of Fiji and Papua New Guinea are similar. Both contain provisions on competition, consumer protection and price regulation. Price regulation has been raised as an issue and is discussed in the individual reports. Price regulation is generally judged to be appropriate to the current circumstances of the individual jurisdictions at this stage. However, the comparative report cautions against expanding the price regulation role without significant consideration and recommends regular review by the regulators and the Governments to determine whether price regulation is and continues to be the most effective approach in relation to particular markets. The report makes no other comments regarding price regulation.

17. Both jurisdictions make multiple suggestions as to possible amendments to the competition (restrictive trade practices) provisions of their laws. These provisions have not been used regularly in either jurisdiction during the relatively short time the laws have been in existence. Some suggestions for amendment that involve adding provisions appear to have been made merely because other competition laws include such features. With regard to one specific provision, one jurisdiction wishes to take the provision out while the other wishes to insert a similar provision. Given the difficulties of entrenching and enforcing these relatively new laws, both jurisdictions are cautioned against making amendments at this point, unless a real shortcoming in the law exists or a real need for an amendment is shown in practice.

18. Subject to the foregoing, some fine tuning of the substantive legal provisions appears warranted. The major recommendations in the comparative report are summarized below.

1.2 Competition (restrictive trade practices) provisions: Recommendations

19. A definition of the term "market" and a clearer definition of the term "consumer" should be included in the Fiji Ordinance.

20. The ICCC Act should clarify the extent to which government business activities are included by expanding a definition of the term "engaging in business", in order to assist in interpretation of this issue. Provisions on extraterritorial application of the ICCC Act should be considered in consultation with legal opinions from government agencies.

21. The ICCC Act incorporates a statutory exemption for conduct that is specifically authorized by another law. This should be amended to define "specifically authorized" to mean that the other law specifically states that the ICCC Act does not apply to it, as this has been most effective in clarifying this provision in Australia.

22. Both jurisdictions are considering new cartel laws. Careful consideration is required to determine whether the jurisdictions should enact more specific cartel provisions or whether the current provisions should be modified to modernize them. The issue of criminalizing cartel conduct is raised by both jurisdictions, but the utility of this approach needs to be carefully examined to weigh the benefits and disadvantages of conducting criminal trials, as discussed in detail in the comparative report. Advantages of deterrence, for example, should be weighed against the difficulti - for regulators arising from the higher standard of proof in a criminal trial. Further co. ideration of the provision on the misuse of market power in each jurisdiction is essential. Provisions to curb unilateral market power are a difficult area in all jurisdictions. The willingness of courts to take an economic view in interpreting these provisions will prove crucial in determining their ultimate effectiveness. The current Australian Government Competition Policy Review (Harper Review) is considering similar provisions and may provide useful information and

analysis for further consideration in each jurisdiction before final decisions are made (see http://competitionpolicyreview.gov.au/). With regard to the suggested amendments in relation to this provision in the ICCC Act, the following may be noted:

a) The change of name would be appropriate.

b) The Australian position is not described entirely accurately in the Papua New Guinea report. The provision has always been aimed at competition and not competitors, although if competitors who compete effectively are damaged then competition is also damaged. There are a number of cases, including in the High Court, which make this point clearly. The impact on competitors may therefore be relevant if the overall effect is to damage competition. If the provision was focused on competitors outside this framework, it would mean that the provision could be used to protect inefficient competitors, which would not be efficiency enhancing for the market. While not all competitors will be protected, the provision will apply where effective competitors are damaged by a misuse of market power.

c) As market power is key to the operation of the provision, the reversal of the onus on the question of market power is not recommended. In Australia, this has been considered and rejected, to date. Competition law is aimed at fostering competitive conduct. To reverse the onus would certainly chill vigorous competition by large but efficient competitors. Even if they were ultimately cleared of any breach of the provision, time and expense would have a chilling effect.

d) A change to dominance would not resolve the majority of issues raised in the Papua New Guinea report. The substantial degree of market power standard was used in Australia because the nature of the political economy meant a propensity for industries to be characterized by oligopolies. No player in an oligopoly market is likely to be dominant and the test was therefore lowered to substantial degree of market power. The test should not be changed at this stage. If organizations are dominant they will clearly satisfy the current test.

e) The list of specific prohibitions suggested is too broad. Some of the conduct may be efficiency enhancing and should not be prohibited generally. If the provision is made subject to a competition test, which is part of current debate in Australia, this list might be more acceptable.

f) The test in relation to intellectual property should be retained. If there is little intellectual property to protect in Papua New Guinea it will have little impact at this stage, but will be there if needed.

g) Unfair conduct is not part of the misuse of market power. If the Papua New Guinea Fairness of Transactions Act of 1993 covers unfair conduct and a prohibition is required, it is better placed in a statute that is not based on economic considerations.

23. The provision on the misuse of market power in section 66 in the Fiji Ordinance is almost identical to an earlier version of such a provision in the Australian Competition and Consumer Act. No amendments to this provision seem to be proposed. However, there is an additional provision in section 67 focused on a substantial degree of market power that has an anticompetitive effect. It is suggested that more clauses should be added to this general provision related to "specific types of anticompetitive behaviour such as price signalling and predatory pricing". These suggestions are problematic. Price signalling is generally not confined to persons who have a substantial degree of market power. It is more common in oligopoly markets, where it is usually somewhat difficult to show that persons have a substantial degree of market power. The Australian Competition and Consumer Act has enacted problematic provisions on price signalling that currently apply only to banks but have not been applied to date. As noted in the Fiji report, issues in relation to "providing

information disclosures to push prices up" are similar to price signalling issues. The Harper Review in Australia may provide some assistance to further considerations on the enactment of a price signalling type of provision, should Fiji be committed to enacting such a provision.

24. With regard to predatory pricing, one of the most basic problems with this issue is that there are different views on what predatory pricing actually is. The relevant United States of America law provides that pricing is predatory only if the person engaging in below-cost pricing has the capacity to recoup earlier losses once the competitors have been driven out of the market. This then requires high barriers to entry in that particular market. This theory is based on the idea that consumers are better off with lower prices until they are raised by the powerful incumbent once other competitors have been driven out. If barriers to entry are not high, once prices have been raised, other competitors will enter the market to drive prices down again.

25. Predatory pricing law under the Australian version of the provision on the misuse of market power has proven problematic. Despite judicial comment that the concept of recoupment was a useful consideration in predatory pricing cases, amendments were enacted to emphasize that it was not necessary to show predatory pricing under the Australian Competition and Consumer Act. Australia has had no successful cases on predatory pricing under the version of the provision on the misuse of market power that is mirrored in section 66 of the Fiji Ordinance. Following a number of unsuccessful cases, other provisions were inserted in the Australian Competition and Consumer Act and, after a number of years, have not been used. The Harper Review in Australia may provide some assistance to further considerations on the enactment of a provision on this issue in Fiji. Many of the submissions to the review and much of the surrounding discussion have been on improving the existing provisions on the misuse of market power in the Australian Competition and Consumer Act. This matter is suggested for background information, in order that Fiji may develop the most appropriate provision for the jurisdiction.

26. Third line forcing, if prohibited, should be subject to a competition test. [5] The proposed provisions should not be placed in Papua New Guinea consumer laws.

27. Resale price maintenance provisions in Papua New Guinea should be simplified to the extent possible, subject to the detailed comments in the comparative report about the threshold concept of price specified.

28. Price discrimination prohibitions in Fiji should be repealed, as the current economic view is that they inhibit price flexibility. Price discrimination by players with substantial market power is already addressed by the provision on the misuse of market power. The Australian provision prohibiting price discrimination on which this provision was modelled was repealed some time previously.

29. Merger regulation in each jurisdiction should only be made subject to a mandatory notification process over a set turnover threshold if the benefits of such an approach clearly outweigh the increased workload imposed on regulators who must review each notification. Compulsory notification over a set threshold involves time and resources on the part of both applicants and regulators. Merger regulation works well in both Australia and New Zealand and neither has compulsory notification. Informal clearance is mentioned in the Papua New Guinea report but is only relevant where there is no compulsory notification. The single joint process of formal clearance and authorization suggested for Papua New Guinea is a good idea.

[5] Third line forcing denotes a supplier making it a condition of the supply of goods or services that the goods or services of an unrelated third party must also be acquired, or refusing to supply without third party acquisition.

30. Merger factors are common in other jurisdictions and should be added to the Fiji provision. Both jurisdictions have authorization in relation to some or all of their competition (restrictive trade practices) provisions. While it is noted that this approach has been criticized as not promoting compliance, experiences in small market economies suggest that it may be useful and workable where further market entry is not particularly likely. Authorization should be transparent and appealable.

31. The Papua New Guinea report suggests that notification might be introduced. Notification in Australia is a simpler process for seeking approval but is available for a limited range of conduct. The notification process is not recommended generally, as it would impose a further regulatory burden on the ICCC. The notification process for collective bargaining by small business has, however, proven useful in Australia and is worth considering. With regard to particular suggestions in relation to this matter in the Papua New Guinea report, the following may be noted:

a) Interim authorization. This is a flexible mechanism that has rarely been used in Australia but may be useful from time to time. It should be implemented if a need is shown.

b) Forms. Prescribed forms are useful tools that give applicants a strong indication of the information requirements for seeking authorization. There needs to be a good reason why they may not be necessary.

c) Public register. This is an important issue related to transparency and accountability in the authorization process. Provisions should be implemented covering a public register, along with rules about business confidentiality for parts of applications, etc. Applicants should be given the opportunity to withdraw material if a claim for confidentiality is rejected.

d) The ICCC should expressly be given the power to impose conditions on authorization.

e) Clearance. This should be timely but workable for the ICCC and applicants. Twenty (non-business) days seems to be a short time frame for, for example, a complex merger clearance, as does 72 days for a merger authorization.

f) There is no reason in principle why the ICCC should not be both the enforcer and decision maker on authorization. This has occurred in Australia and New Zealand where the Competition and Consumer Commission and the Commerce Commission, respectively, have adjudicated authorization for many years with good results.

g) There should be an appeal process, from authorization to a tribunal, separate from the ICCC. Detailed consideration should be given to the nature of the appropriate test to be employed on appeal in the tribunal (Australia and New Zealand have different approaches) and the role of the ICCC in the process should be set out in legislation.

h) Fees. The ICCC should be able to set fees for certain of its services such as authorization and retain these fees for use by the agency.

32. The Fiji report notes that the definition of authorization is currently limited to authorized prices with respect to controlled goods. This definition is incomplete and should be expanded to include the authorization of conduct under section 41 of the Fiji Ordinance, as suggested in the Fiji report.

1.3 Consumer protection: Recommendations

33. It is appropriate that in both jurisdictions, competition and consumer laws should be administered by a single regulator that has adequate resources.

34. A general prohibition on misleading or deceptive conduct is essential in both jurisdictions. This has proven overwhelmingly beneficial in Australia and New Zealand. However, the general provision is not criminal in either of these jurisdictions, due to its extremely general nature. The words "unfair or likely to be unfair" should not be added to the ICCC Act, as the concept of unfairness is subjective.

35. Broader consumer protection provisions along the lines suggested in the Papua New Guinea report should be implemented in Papua New Guinea, subject to the comments and recommendations in the comparative report. Detailed comments on other suggestions for amendments in Fiji are made in the comparative report.

36. Provisions for post-sale protection should be introduced in Papua New Guinea. While a scheme of consumer warranties and guarantees mirroring earlier Australian provisions, and already in place in Fiji, is suggested in the Papua New Guinea report, the country should consider Australia's replacement statutory consumer guarantees carefully before implementing a scheme. These more recent provisions have been designed to update the earlier warranties and guarantees and seek to address a variety of issues that arose in relation to the previous scheme. Fiji should consider examining this statutory consumer guarantees scheme, which may avert the likely shortcomings of its current scheme, although it is understood that Fiji's current provisions are much used and that amendment may not be considered necessary.

2. The regulators

37. Various changes to the natures and procedures of the individual regulators should be made, as noted in the comparative report.

2.1 Investigative powers: Recommendations

38. A major difficulty in competition law cases is the lack of evidence supporting a violation of the law. Both jurisdictions have substantial powers to obtain information and evidence. While some suggestions are made for amendment to these powers, it is difficult to draw conclusions as to why they are needed, given the information provided. Further consideration should be given to the individual suggestions. It is unclear whether the authorities have received specialized training for conducting dawn raids, but if they have not, then this should be prioritized, as it is a complex process with a number of risks for the inexperienced. Specialized training in other aspects of obtaining evidence and dealing with potential defendants, witnesses and informants should be given a high priority.

2.2 Enforcement: Recommendations

39. A number of broad additional enforcement powers, remedies and relief are sought in the Papua New Guinea report. Some of these are aimed at taking the emphasis off the court as the decision maker in enforcement and providing the ICCC with flexible powers to issue various notices, with potential offences for non-compliance. The ICCC states that such new provisions would increase the timeliness and flexibility of enforcement. This sounds good in theory but further consideration should be given to all implications of this major change in approach. Appeals to the courts in relation to notices would be essential to ensure procedural fairness, should the notice suggestion be adopted.

40. The ICCC currently takes action in court for contraventions of the ICCC Act. The Papua New Guinea report recognizes that overseas models use courts, but argues that this does not work well in the country and that "Papua New Guinea needs its own compliance model". The report suggests that the ICCC should be given a wide range of powers and that "the courts are the last resort, if at all".

41. The Papua New Guinea report sensibly suggests that compliance rather than legal action is important at this point in the development of the law and makes a number of suggestions to allow the ICCC to issue various notices rather than take matters to court. With respect to the proposed compliance notices, for example, the report states that it is "simply not feasible in Papua New Guinea to seek court interlocutory injunctions. It would take too long, the skills are not there and the courts are not yet able to consider such issues. A simple request to cease conduct does not work in Papua New Guinea, especially with State-owned enterprises".

42. Various provisions are thus suggested as general powers of the ICCC (i.e. applying to all investigations and enforcement), as follows:

a) Substantiation notices. The suggestion of substantiation notices in relation to claims and representations is useful in relation to claims by advertisers, where a person is given 30 days to comply, after which failure to substantiate would be an offence.

b) Compliance notices. A compliance notice would be issued to a person involved in an ongoing breach of the ICCC Act, demanding that the breach cease. The notice would be valid for 60 days and appealable to the court. The notice would be prima facie evidence of a breach, putting the onus on the recipient to show that the ICCC Act has not been breached. This would enable the ICCC to move swiftly to order an undertaking to comply with the law. The Papua New Guinea report suggests that the ICCC should be cautious and not abuse this power. In this context, it would be appropriate to add the word "reasonable" before "opinion" in the draft. Liability for negligence on the part of the issuer would remain.

c) Public warning notices. Such notices would be issued if the ICCC had reasonable grounds to suspect that conduct might constitute a contravention and if it was in the public interest. Liability for negligence on the part of the issuer would remain.

d) Advisory notices in relation to consumer information. Such notices would allow the ICCC to comment on the sufficiency of consumer information, and non-compliance would be an offence.

e) Guidelines. It is somewhat unclear what guidelines in relation to the administration of the Division would do, for instance whether they would cover the meaning of the laws or the way in which the ICCC is likely to interpret and enforce them. This should be clarified, as the ICCC may not wish to be constrained in all situations, and should be able to amend the guidelines immediately following a differing court decision.

f) Enforceable undertakings. The ability to negotiate and accept such undertakings significantly enhances the ability of a regulator to deal flexibly with a range of issues. It creates flexibility particularly in a merger transaction, but also allows cases in other areas to be settled in appropriate situations without the time and costs involved in taking a matter to court. Publicity for such settlements is still available and may act as a deterrent for others. The ICCC will need to exercise judgement about which matters to settle in this way and which to pursue through the courts to ensure that there are sufficient cases to deter further breaches and also to obtain guidance from the courts. The balance between settlement and litigation is always a difficult one for a regulator. It is recommended that a provision covering all prohibitions be included in the ICCC Act. As this part concerns general powers, the provision is probably in the correct place.

g) Commission to seek compensation. It is recommended that this should be a general power in the ICCC to seek compensation for breaches of the ICCC Act.

43. Access to justice, particularly in consumer matters, is difficult in many jurisdictions. The ICCC cannot handle all consumer disputes throughout the country. A local system of

resolving complaints, such as the Lik Lik court in Papua New Guinea, is essential and it is recommended that this option be given serious consideration.

44. Both jurisdictions should consider the introduction of a leniency policy for cartel conduct. The approach to this issue will differ if cartel conduct is criminalized.

45. Both jurisdictions have made efforts to publicize the laws and enforce them. These efforts should be increased, with a careful selection of cases with circumstances likely to be influential and with substantial publicity regarding enforcement actions and outcomes. This, coupled with the education of consumers and business through methods including vibrant websites, should increase awareness, emphasize the risk of contravention and increase compliance.

3. The judiciary

46. It is difficult to assess the role of the judiciary in either jurisdiction given that few cases have been taken and finalized. Both countries are common law jurisdictions, which give the courts the primary role in decision-making. However, the suggested changes to the Fiji law would remove much of the responsibility for enforcement action from the courts at first instance. Given that one merger case has been held up long term in the Papua New Guinea courts, that the ICCC has sought broader powers to enforce outside the court at first instance and that the Fiji Commerce Commission resolves many complaints by conciliation, it appears that the courts are not yet an efficient resolution mechanism for competition law matters in either jurisdiction.

3.1 Effectiveness of merger control

47. It is difficult to determine how effective merger processes are at this early stage of enforcement of the laws. There were three merger authorizations in Fiji in 2013. There have been a number of merger authorizations in Papua New Guinea. One merger case is in the courts, as detailed in the following subsection.

3.2 Enforcement records to date

48. The two jurisdictions have similar records with regard to enforcement.

49. The Papua New Guinea report notes that there have only been two competition cases since the enactment of the ICCC Act in 2002, one "a merger case stuck in the Papua New Guinea National Court at interlocutory stage for two years and the other a challenge to a statutory notice that was settled". There have been several consumer protection, labelling and price-related decisions. No written decisions are available.

50. In late 2014, the ICCC prosecuted two public motor vehicle operators (which are declared services) for breaches of chapter 320 of the Prices Regulation Act in charging higher than the maximum set fares. Several other potential consumer protection cases have been settled with businesses giving written understandings to address the consumer detriment. They will be liable to prosecution for non-compliance.

51. While there appear to be significant numbers of complaints, court enforcement is not producing decisions that could assist in interpretation of the law or serve as a deterrent to others in business. The ICCC has dealt with a large number of complaints on competition matters, including eight authorizations and 17 clearance applications. It has investigated 15 cases without prosecuting any in court, with four still in progress. As noted in the Papua New Guinea report, five cases have been closed due to lack of information or insufficient evidence, two due to the difficulty of proving intent or purpose and four with an administrative remedy.

52. The ICCC notes that it is a young competition authority with limited resources, which have been focused on building its capabilities and achieving a balance between prosecution and voluntary compliance. The agency has engaged in "information bridging and advocacy efforts to educate stakeholders" about the law. The ICCC expects the number of cases to increase over time. However, after 12 years, it seems the focus of the ICCC should change to more visible enforcement outcomes. This may be achievable if the new enforcement notices are adopted.

53. While the ICCC has created both short and long summaries of the ICCC Act, it seems that these could be enhanced through the use of practical examples to illustrate conduct and situations that are likely to infringe the laws. Brochures and guides should do more than paraphrase the wording if they are to be truly effective for consumers and business to understand their rights and obligations. The proposed guide on advertising and selling seems particularly appropriate, but must contain examples based on real-life situations if it is to be truly effective. Many new jurisdictions have done this particularly effectively. For example, Singapore engaged in an effective strategy to inform consumers and business following the enactment of its law in 2006. Formal guidelines are important, as are staff manuals, but informing consumers and business is particularly important. Informing business about consumer product safety requirements is also particularly important.

54. The Fiji report encouragingly notes that there is already substantial evidence of the benefits of the competition regime in Fiji vis-à-vis economic development, greater efficiency in international trade and consumer welfare.

55. The Fiji Commerce Commission has stated that it approaches compliance by encouraging business to comply, "acting decisively to stop hard core or flagrant offenders" and "empowering consumers with the knowledge and skills to make informed choices" and that, in practice, this means having a "business consultation programme balancing business and consumer needs, one to one discussion on compliance requirements during mediations, targeting areas where consumers are more at risk, conciliating consumer complaints and developing guidelines and monitoring their compliance".[6]

56. Court actions that have been taken are listed in the annual reports of the Fiji Commerce Commission, but most of the cases are in relation to consumer protection and fair trading and price regulation. Part 6 of the Fiji Ordinance has yet to be tested in court.[7] There have been no cases on competition (restrictive trade practices) provisions. All matters of this nature have been resolved via Commission decisions and the stakeholders have complied with the resolutions.[8] Most cases have been in relation to consumer protection and fair trading and price regulation.[9]

57. The comprehensive annual reports of the Fiji Commerce Commission provide an overview of what the Commission has been doing. The annual report for 2013 notes that the Commission authorized three mergers in 2013. The provisions on conditions and warranties in consumer transactions have been regularly used. In the annual report for 2013, the Commission summarized its role in the following way: "The Commission successfully completed major pricing activities, strengthened its enforcement in relation to the determinations and fair trading cases, handled numerous unfair and restrictive trade practices cases and also carried out the market surveillance and research on a number of consumer protection issues."

[6] Fiji Commerce Commission, 2013, *Annual Report*, available at http://www.commcomm.gov.fj/wp-content/uploads/2015/02/2013-annual-report-Final-Copy.pdf.

[7] Responses to questions of reviewer.

[8] Ibid.

[9] Ibid.

58. Complaints are another indicator of the vigour with which the law has been implemented. The annual report for 2013 notes that the Fiji Commerce Commission received 720 complaints from the public related to fair trading, of which 666 were successfully closed during the year, that substantial work was undertaken in relation to regulated industries and that a large number of rent complaints were dealt with and almost 30,000 inspections of traders carried out. A table entitled "Fair Trade Section Highlights" confirms the large number of complaints related to consumer protection, while a small number concerned the misuse of market power and exclusive dealing. This suggests a lack of public awareness about the competition (restrictive trade practices) provisions of the Fiji Ordinance.

59. No guidelines on any issue have yet been prepared, although a number of forms have been prepared related to making complaints and various types of authorization applications. Many awareness workshops and seminars, and campaigns through the Fiji Commerce Commission website and Facebook, have been conducted to inform consumers of the conditions and warranties in consumer transactions, and the Fiji Commerce Commission plans to hold 180 consumer awareness workshops in 2015.[10]

60. The Fiji Commerce Commission must extend its awareness workshops and seminars to compliance in areas in the competition (restrictive trade practices) provisions, to raise the level of understanding of consumers and business about this area of the Fiji Ordinance.

61. The key to obtaining benefits for the economy and consumers from implementing competition law is in achieving a credible enforcement record through professional decision-making. This gives credibility and respect to the authority. Most authorities have a combination of training and capacity-building programmes in cartel detection, investigative methods and merger assessments for operational staff and instruction in case management and assessment techniques for senior officials. All of these areas are important for both jurisdictions. The status and credibility of the regulators in each jurisdiction could be enhanced through more effective investigation and enforcement of relevant cases.

3.3 Public resources dedicated to enforcement

62. The allocation of resources is always difficult in relatively new agencies that have many competing priorities.

63. The regulator in each jurisdiction is relatively small. Besides enforcing the competition (restrictive trade practices) provisions, each regulator has a myriad of other tasks to address, such as consumer protection, pricing, monitoring and consumer and business education, as well as other issues. All of these are relevant to the overall competitive environment.

64. The Papua New Guinea report contains a list of 17 priorities, each of which is noteworthy. There are many, however, and it is unclear whether they have been sufficiently clarified or whether the priorities have been effectively listed. Whether an agency of the size of the ICCC can effectively deliver on 17 priorities is questionable.

65. The Fiji report refers to a list of 16 priorities contained in section 15 of the Commerce Commission Decree and a further five in relation to regulated industries. While there are a number related to protecting the interests of consumers, provision of advice and investigations, there is none related to the enforcement of provisions that deal with anticompetitive conduct. This focus should be addressed in these priorities, along with the other tasks that the Commerce Commission is charged with pursuing.

[10] Ibid.

66. In Papua New Guinea, the ICCC has a staff of around 50, although a higher number of positions are currently being filled. The Fiji Commerce Commission has a staff of 52. In each jurisdiction, the number of staff currently dedicated to enforcement of the competition (restrictive trade practices) provisions of each law is disturbingly small. In Fiji, for example, it is currently five. This likely constitutes a substantial reason for the lack of focus on enforcement in these matters.

67. The regulators need to be able to dedicate sufficient numbers of staff to this area if headway is to be made in education, awareness and enforcement.

4. Detailed questions in peer reviews

68. A number of detailed and important questions are raised by the peer reviews. Most are unable to be answered, given the understandably brief nature of the self-assessment reports provided and the review process that has been undertaken. It is recommended that further consideration be given to these questions as part of an ongoing process of external review of the laws, the regulators and their processes.

B. Recommendations for Governments

69. In relation to competition law, Fiji and Papua New Guinea have a number of issues in common. Both have relatively new laws, although the ICCC Act in Papua New Guinea has been in existence for longer than the Fiji Ordinance. Their competition regulators have a number of different mandates besides competition (restrictive trade practices) provisions. This puts pressure on the amount of resources allocated to antitrust enforcement. Dealing with provisions that are relatively unknown and based on economic principles also creates significant difficulties for both regulators and the courts. The regulators are relatively small institutions. Antitrust enforcement is a professional activity and the quality of the staff of a regulator is an asset on which every Government can rely for the development of a more market-oriented regulatory environment. Staff salaries should be comparable with those for other important economic portfolios. If staff members are not well trained, the quality of the enforcement cannot be guaranteed to enable these regulators to make a difference in their jurisdictions.

70. In order to increase their effectiveness, the authorities need more resources and better funding. It is not easy to convince Governments to provide more resources, but the best way to do this is to conclude a few high-impact cases. Such cases can emphasize the importance of competition law and policy to the public and to the Government. Improving the resources and funding of the national competition authorities constitutes the core recommendation in the comparative report.

C. Recommendations for competition regulators

71. Competition regulators must enforce the law more effectively, starting with some high-profile cases, initiated by dawn raids and ending with important sanctions. The reputation of the authorities would benefit as a result, and obtaining additional funding would be made politically easier. Dawn raids are the most common way to discover whether a firm has actually violated the competition provisions, especially with regard to cartel violations. They should come as a surprise to the firm, otherwise evidence will likely be destroyed.

72. In addition, and despite the relatively small numbers of staff members dedicated to this area, the regulators must prioritize competition (restrictive trade practices) provisions in their enforcement activities. Currently, neither regulator has achieved a final court

decision in a matter related to competition provisions. This should be a top priority, and additional staff should be deployed in this area until such an outcome has been achieved. The balance between pursuing offenders to a successful court outcome and a fine must always be weighed against the benefit of settling a matter on terms that remove the anticompetitive conduct, but this is all done quietly. Consumers and business need to see a high-profile company shamed in court for breaching such provisions from time to time, to reinforce the importance of the law and the power of the regulator, as a deterrent to further conduct in breach of the law.

73. Some comments have already been made about the training of staff and the judiciary. While it is recognized that some training has been undertaken to date, further training should be conducted and focus on the competition (restrictive trade practices) provisions of the law. The pursuit of high-profile offenders provides regulatory staff with the experience and confidence to pursue others effectively. Training should also be focused on drafting and implementing guidelines and communications on how to interpret substantive provisions of the law.

74. The enforcement problems in the two jurisdictions are somewhat similar, and their laws have a common genesis. Communications with regard to common issues and good and bad experiences would be of great benefit to both regulators. In addition, both regulators should strengthen their ties informally, in order to exchange experiences and possibly cooperate at the enforcement level. Joint training activities aimed at increasing expertise should enhance networking and the development of professional relationships.